

REDISTRICTING "HOT SPOTS"

October 1821, 2011

Texas

Texas is an early primary state and in order to conduct this election, it is necessary for congressional and legislative districts to be in place in November. For obvious reasons, it is unlikely that Governor Perry is not going to be willing to call the Legislature back into session to shift the primaries to a later day.

The Texas remap is still awaiting a Section 5 preclearance decision from a three-judge panel in the DC District Court and all that has been scheduled so far is a hearing on motions by the Texas Attorney General for summary judgment on November 2nd. A summary judgment in favor of congressional and state house plans is highly unlikely, as DOJ and the minority interveners have presented plausible objections to these maps which were both drawn by the State House Representatives map drawers (DOJ has indicated that it does not have objections to the state ~~senate~~ Senate or state Board of Education ~~re~~ maps, which were drawn by the state Senate map drawers.) It is likely that summary judgment will be granted on the state Senate and state Board of Education maps. No trial date has yet been set, but a decision any time in November is unlikely if the issue is set for trial it is unlikely that a preclearance decision could be reached prior to the beginning of the 2012 election cycle in Texas. This is why it was always imperative that any redistricting plan enacted in Texas be capable of receiving summary judgment from the District Court for the District of Columbia because without an early preclearance decision it was highly unlikely that any whole or partial redistricting plan would be available for the 2012 election cycle in Texas.

Meanwhile, several minority plaintiffs filed a VRA Section 2 racial and language discrimination/deadlock case last summer challenging all three maps before a second three-judge federal panel in San Antonio. The racial and language discrimination trial has already been concluded and most observers indicate that it did not go well for the State. The State's own expert witness, who is a Democrat and has testified for dozens of Democrat controlled entities in the past, "trashed" the state's maps on the stand. In any event, tIn light of the District Court for the District of Columbia's trial schedule the he San Antonio court has ordered all parties to present briefs and recommended plans this month and is holding a hearing on the recommendations and standards embodied in an interim plan the same week as a summary judgment hearing before the District Court for the District of Columbia, and is preparing to act if the DCDC action is not completed in time for the 2012 election cycle to commence.

It is likely that the San Antonio court will impose interim maps for the congressional and state house districts for the 2012 elections. The principal question before the San Antonio court is

whether it will grant "legislative deference" to the redistricting map passed by the Texas legislature or whether it will grant deference to the last legally enforceable map which would be the 2003 congressional map and the 2001 Legislative Reapportionment Board map as modified by the US District Court. The Texas Attorney General is asserting that as long as the District Court for the District of Columbia has rendered no opinion on the preclearance issue the 2011 map passed by the legislature is entitled to "legislative deference." The Texas Attorney General made this exact same argument when opposing MALDEF's motion for TRO and injunction when MALDEF requested the automatic injunction against implementation of an un-precleared "change in voting." The San Antonio court, probably correctly, rejected the Texas Attorney General's argument and granted the TRO and injunction.

The Texas Attorney General has an additional argument which he could make at this point that was not available at the time of the TRO. He can now argue that the Department of Justice's answer in the District Court for the District of Columbia litigation is the equivalent of a preclearance objection letter and legislative deference should be granted for all parts of the plan other than those objected to by the DOJ. However the Texas Attorney General appears to eschewed this argument in favor of an argument that attempts to get the court to impose the entire 2011 map as the court's interim map. It is not clear that the court is obligated to use any portion of the enacted plans as the basic structure in the drafting of its interim plans—although the Texas Attorney General is taking that position. Let it suffice to say that all attorneys do not agree on this premise.

If the court develops its own map "~~de novo~~", using the present maps as a baseline, the three or four seat gain the Texas GOP stakeholders were expecting could evaporate—and the Expected gains in GOP would almost certainly lose seats in the state house—could also remain unrealized. This is a serious situation for the GOP and has the potential to be our most significant redistricting setback of this cycle.

Litigation funding is not an issue at this point - although it would have been wise to have funded independent GOP interveners. That train, however, has already left the station. It is questionable at this point whether anything can be salvaged for the 2012 cycle, however if events develop as it appears they may, then extensive efforts will be required in Texas in 2012 or 2013 in an attempt to recover the situation for 2014 which may be entirely possible if parochial political considerations can be put aside for the greater good of the party.

The Citizen Redistricting Commission has finalized all of that state's redistricting plans, without any unexpected outcomes. The number of safe GOP and Democratic seats is smaller (more so for the GOP than the Democrats) and the maps now have a small number of actual competitive districts. Some GOP stakeholders were expecting better results; but given the Democrats stronger voting strength, the outcome was predicted by experienced line drafters.

Although efforts by some GOP stakeholders, both in court and by referendum, are underway, ~~these are unlikely to be successful and the~~ odds are high that the 2012 elections will be held using the commission's enacted districts. It will take significant funding for the GOP to successfully challenge the commission's maps, and it is unlikely that this money will be forthcoming.

Nevada

The two parties are locked in a deadlock over both congressional and legislative redistricting. A panel of court masters has been appointed by a state district court judge and is in the process of holding hearings and working on proposed solutions. ~~A hearing before the Judge is scheduled for November 14th to discuss criteria. Plans should be completed in mid-November.~~ Nevada GOP stakeholders are seriously hampered by a lack of funding for litigation.

On October 15th, the court masters released plans for both the congressional and legislative districts. GOP analysts are rating the congressional map as one strong GOP district, one strong Democrat district and 2 competitive districts. Both current GOP incumbents have better percentages than in their previous districts.

~~Comments-Briefs~~ on the Masters' plans and suggested plans are due before the Judge on October 24th with a hearing scheduled for October 27th. We are attempting to get the court to modify the masters report and not divide the Hispanic community in Clarke County. A final hearing in on several interlocutory motions in front of the State Supreme Court is scheduled for November 14th. No matter the result of the interlocutory motions any decision of the State Court will likely be appealed to the Nevada Supreme Court. There is also concurrent federal litigation which would draw the maps if the state courts are unable to produce a map in a timely fashion or challenge the state court map if the Hispanic community is divided. Currently the funding for this litigation has largely expired and whether the rest of the litigation which will take the remainder of this year and much of the next can be continued.

The ability to ~~have a competitive~~ gain control of the GOP state senate, better numbers in the Assembly including sustaining vetos, and one and a half GOP congressional seat are at stake. This case is chronically underfunded on the GOP side.

Colorado

Colorado Legislative Redistricting Commission has presented its plans for the House and Senate which are up for review by the state court this month. The GOP is under pressure to prevent top Democrat national attorneys and legal experts from convincing the court to make modifications unfavorable to the GOP. Briefs by both sides are due into the Supreme Court on November 9th and the plans are expected to be finalized on December 14th. Litigation funding is a serious problem for the GOP, which is going up against a well-funded Democrat effort.

The congressional remap has deadlocked and is in trial before a state court in Denver. The trial began on October 11th and is expected to conclude during the week of October 16th. The Republicans are attempting to get the court to adopt a least changes approach. The Democrats are pushing a map which will radically rearrange the state's districts in their favor. This map has been supported by extensive expert testimony to assert that it will result in more competitive and has "fairer" election results. The Democrats are using "normalized" election statistics to support their assertions. We have been limited in the number of experts we can call because of our funding. If the Democrats succeed it is unlikely that we would engage in any further litigation. If we succeed the Democrats will probably appeal to the Colorado Supreme Court. There is no parallel federal litigation in Colorado even though an appeal would make it more likely that the federal court might draw the lines since an acceptable state court map might not be timely. We had to end very promising litigation in Colorado in the middle of the past decade because we ran out of money. Once again, the GOP is being hampered by lack of litigation funding. One to three Congressional districts could be at stake as well as our ability control the legislature.

Minnesota

Minnesota is engaged in deadlock litigation on both its congressional and legislative maps. Our newly-won legislative majorities are at stake and the Democrats have sent in their "A Team" supported by the Democratic National Redistricting Trust. They will attempt to weaken several of our congressional districts and to convince the 5-judge panel, now in charge of the process to develop a map more to their advantage. GOP funding is a serious issue and has already hampered bringing in experienced national redistricting attorneys and experts. A hearing on criteria is set for October 26th, with final suggested plans due in on November 18th. The Democrats are again on track to use "normalized" election statistics to assert that their plans are both more competitive and fair. They will attempt to hide this behind new community of interest criteria which they are attempting to get the court to adopt. Refutation of these assertions will require expert witnesses, currently we will probably be limited by funding to only one. At this time our strategy is to rely on strict adherence to the criteria ultimately adopted by the court. This has the advantage of hopefully making the draws relatively formulaic thereby reducing the need to analyze or rely on amorphous issues of community of interest and political fairness. Responses and comments on the suggested plans are due on December 9th. The final court hearing is scheduled for January 4, 2012. This is a special court appointed by the Minnesota Supreme Court. This is a bipartisan panel of judges which will, if history is a guide, produce a consensus map. -If this is the case, it is highly unlikely that the Minnesota Supreme Court or a

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federal court will disturb the result. However the Democrats did file parallel federal litigation which is deferring to the state litigation.

Ohio

The GOP has enacted highly favorable maps for both legislative and congressional districts but the Democrats filed a referendum which, if as seems likely it-qualifies, will ~~take~~ stay implementation of the congressional map ~~out of play~~ for the ~~upcoming~~ 2012 election cycle ~~because until the referendum will appear on the November, 2012 ballot is decided in the November, 2012 election. The map cannot be used unless it has been upheld by the voters.~~ This has the real potential to move redistricting into the courts with less favorable results for the GOP. As many as 4 congressional seats are at stake for the GOP. Although the legislative maps certainly can be challenged in court, as they have each of the past two redistricting cycles, they are not subject to referendum.

The Ohio litigation effort, however, is adequately funded ~~with taxpayer funds~~, and capable attorneys and witnesses are in place to combat the Democrats' litigation efforts. The legislature added the congressional plan to an appropriation ~~to the statute enacting the congressional plan in~~ an attempt to block the possibility of a referendum, but the Democrats successfully challenged that tactic before the Ohio Supreme Court.

If the legislature is unable to pass the redistricting bill by a super majority, which may be possible, then the Ohio courts may impose a map. State court litigation to secure jurisdiction in this scenario has already been filed. We would attempt to get Ohio to follow the California precedent of the 1980's cycle and impose the referred map as an interim court map for one election only. If this does not succeed then either an Ohio state court drawn map or federal three judge panel map will be used for the 2012 Congressional elections.

Arizona

The Democrats were successful in subverting the Citizen Commission which is redistricting both the congressional and legislative districts. The Chairman tie-breaker, Colleen Mathis, was somewhat less than forthcoming about her ties to the Democrats and she posed as a "post partisan" independent. So far, GOP legal efforts to unseat her have been unsuccessful. The result could be maps much more favorable to the Democrats, giving them the edge at both Arizona's new congressional seat and seriously weakening another. This map could actually allow Democrats to win a majority of the congressional seats in Arizona with a minority of the popular vote. It could also weaken our hold on the legislature. We spent few resources in presenting testimony to the Commission, expert or otherwise, in order to convince the Commission that a map concept different from the one proposed was more legally compliant with the criteria and political fairness.

The maps proposed by the Commission are more favorable to the Democrats, with the congressional map containing 4 strong GOP seats, 3 strong Democrat seats and two “toss-up” seats – somewhat more favorable to the Democrats. It is expected that the Commission will approve its maps on November 4th.

Although the Arizona AG is a Republican, litigation funding for interveners' would give us a better chance of mitigating the damage. This all is a result of Arizona's GOP stakeholders being "asleep at the switch" during part of the process in which the members of the commission were selected.

New Jersey enacts congressional and legislative plans by using two commissions. The only real difference between the two commissions is how the tie-breaker is selected. The legislative commission already enacted its plan and, once again, the tie-breaker selected the Democrats plan. The congressional commission is not due to enact its map until mid-January. The GOP stakeholders are hopeful that the tie-breaker, a former GOP AG, will take a more balanced approach. New Jersey is losing a seat, so the remap is more difficult. Expect either a two or four districts to be combined into “toss up” districts. While litigation did occur over the legislative lines last cycle litigation is unlikely to be successful unless the Commission seriously alters the demographics of the districts in the Newark area.

~~Litigation is not presently expected.~~

The GOP has filed lawsuits against the Democrats' legislative and congressional maps based on Section 2 of the the 14th amendment and the Voting Rights Act. At issue, is the possible creation of more Latino districts and increased African-American percentages in the three African-American seats in Cook County. There is only an outside chance that this will be successful in the case of the congressional map. Since a large number of Latino adult residents are non-citizens, it is unclear that two compact, majority Latino congressional districts can be constructed in the Chicago area. Even if it is, the Democrats might be able to limit the damage ~~to existing Democrat districts~~ and will be able to enact the remedy - as they fully control the process.

Litigation funding will be an issue for the GOP, but Democrats will be well-funded.

Maryland

The Governor has proposed a grotesque congressional map which has the stated purposed of unseating GOP Rep. Roscoe Bartlett by stretching his district from the far-western border of the state to within 4 miles of the DC border in Montgomery County. The districts are so misshapen that the Washington Post has a contest to name several of their districts. The GOP is considering a lawsuit together with NAACP supported African-American plaintiffs asserting that the number of African-American majority congressional districts can be increased from 2 to 3 or at the least the African-American communities in Baltimore, Montgomery and Prince George's counties

should not have been arbitrarily and capriciously divided. This could result in more favorable GOP districts in the remainder of the state. Although 3 majority African-American districts can be created, it is unclear whether or not, under VRA Section 2, a court would force Maryland to create the third district. A similar claim against the Maryland legislative map has a much greater likelihood of success.

So far, it is unclear how this litigation will be funded however Congressman Bartlett is suggesting that he may provide some funding for this litigation. The NRCC may also help fund this effort.

Virginia

Virginia's General Assembly enacted plans for both chambers which have been precleared by the DOJ. The General Assembly was not able to enact a congressional map. If the GOP is able to regain a majority in the State Senate, the GOP could enact a congressional map of its choice, but the plan would still require VRA preclearance. (There is also the possibility of redrawing the Senate map in order to lock in the GOP majority.) At issue will be the seat of GOP Rep. Randy Forbes. The GOP delegation proposed a map which decreased Forbes' African-American percentage in what Democrats would like to characterize as a minority opportunity district. The Senate Democrats proposed a Forbes district which would be majority African-American, but decreases Democrat African-American Rep. Robert Scott's district from majority minority status to a strong opportunity district status. Civil rights groups have presented a plan with two African-American majority districts.

All this indicates that the Obama Justice Department or the District Court for the District of Columbia may refuse preclearance of the GOP delegation map. This would mean in an attempt to force Virginia's congressional remap would be drawn by a court. Two main court drawn scenarios would then exist. One would be that a ~~into~~ three judge federal district court would draw the map. Two would be that a Virginia District Court selected by Democrat plaintiff's would draw the map and then submit rapidly to the DOJ and receive preclearance of a radically Democrat map. Notice this strategy does not work for us because DOJ would withhold preclearance of a GOP state court map. Virginia needs to follow blocker suit as in Ohio. The legislative caucus filed such a suit to protect itself last year. The legislative caucus offered to leave the suit in place but wanted the congressional delegation to pay for a portion of the litigation costs. Since the delegation was unwilling to pay any of the costs of maintaining the blocker suit the legislative caucus allowed the case to be dismissed. This could cost the GOP several districts. Virginia's litigation can be funded in state.

Other Plans at DOJ for Preclearance

Louisiana and Virginia legislative have all been precleared and both followed our recommended strategy of simultaneous submission to the DOJ and the District Court for the District of Columbia. North Carolina, South Carolina and Georgia all have legislative and congressional

maps in the VRA preclearance stage. Alabama has only enacted its congressional map, which is submitted for preclearance. So far only South Carolina's state house map has so far been approved. North Carolina and South Carolina House of Representatives and Congress have all followed the strategy of simultaneous submission

There are potential problems with each of these plans though some are more problematic than others. So far the Department of Justice has been unwilling to interpose an objection based upon the argument that Republican map drawers are removing minority voters from white Anglo Democrat districts in order to build majority minority districts. Both Virginia and Louisiana offered the Department of Justice an opportunity to make this objection however both had asserted the proportionality or near proportionality in the drawing of the majority minority districts. The South Carolina state house map was drawn using similar theories. So far it appears that this strategy will work even with a highly partisan DOJ. This theory will receive further tests from the North Carolina submissions. The South Carolina and Alabama congressional will raise the issue of whether DOJ believes that he can force a jurisdiction to draw the "step" seat, that is the seat that if it remains undrawn would lead the plan below proportionality and if drawn would make the plan above proportionality and create the possibility of a UJO or Shaw violation.—All these states should be able to fund the process with taxpayer dollars and should be able to similarly support litigation in defense of their respective maps.

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Florida

In last-year's election Florida Voters approved new criteria governing both legislative and congressional redistricting. As is often the case in such proposals, the criteria are quite vague. This is particularly true concerning the balance between the creation and maintenance of minority districts versus the other state criteria. Some cynics might contend that the Democrats, whose interest groups sponsored these initiatives, intentionally "muddied the waters" to strengthen the Democrats' chances of shifting the redistricting process away from the GOP-controlled legislature and governor's office and into a more favorable court environment.

GOP stakeholders are struggling with how to balance incumbent interests - which is necessary to enact a plan against initiative language stating that "districts or districting plans may not be drawn to favor or disfavor an incumbent or political party". Also minority interest must be balanced against the directive stating that "where feasible must make use of existing city, county and geographical boundaries". Other questions without firm answers are: Does the initiatives' mandate that "Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice" require or allow the Legislature to create or maintain districts that are less than compact and which ignore city and county boundaries? Is the Florida Constitution's minority representation standard more aggressive than the federal Voting Rights Act Section 2 requirements? Due to the

provisions regarding political motivations for the plans the development of individual voters as interveners and plaintiffs may be crucial to success in this critical state.

In any event, Florida's redistricting promises to be the premier battleground next year. Everyone should expect extensive and expensive litigation. Florida should be able to fund most of its litigation costs in state.

New Mexico

The Republican governor has vetoed the highly partisan legislative and congressional maps passed through the Democrat controlled legislature-- deadlocking the redistricting process. All of the state cases have been consolidated under a single state District Court judge in Santa Fe. Briefs were filed this past week regarding whether the court should appoint a special master or Masters and how such appointment should take place. Whether the court uses a special master or not large amounts of expert testimony will be necessary to adequately make our case. As in Nevada, Arizona, Colorado, into a lesser degree Minnesota all of the states require experts who can explain why the Democrats experts use of normalized data unfairly skews the results in favor of Democrats, we will need expert testimony on the appropriate levels of minority population in order to create a performing district, the polarization rates amongst the minorities in the majority demographic components. We will need experts to assess competitiveness and partisan fairness we will also need data assistance to compile prepare and analyze the data used in cited by the experts and attorneys. Much of this work for New Mexico as well as other states is incomplete however how much can be done at this late date is debatable. New Mexico is early enough in its redistricting litigation that immediate funds could have a substantial benefit.

Mississippi

When the new legislature and governor come into office next year they will immediately have to address redistricting for both Congress and the Legislature. This state was the scene of substantial litigation in the last redistricting cycle that went all the way to both the state and the US Supreme Courts and since it is highly likely that legislature will be unable to pass redistricting maps intense and difficult litigation can be anticipated. This appears to lack sufficient funding to support the litigation ~~litigation~~ that will be required. Essentially all of the strategies discussed earlier in the section on Virginia Congressional will apply to both the legislative and congressional maps in Mississippi.

Kentucky

it is likely that the Kentucky House and Senate which are controlled by opposite parties will agree to exchange maps for their respective chambers. It is possible the congressional map may be able to be compromised as it was in the last cycle. However it is possible we could face deadlock litigation next year in Kentucky. Even if that is not the case if the Kentucky House which is controlled by the Democrats passes a high deviation redistricting scheme similar to the one which they passed in the last cycle we should consider if funding is available filing a *Larios* action against the house map. We had intended to file such suit at the end of the last redistricting cycle but did not do so for lack of funds. Similarly if Arkansas ~~chooses to produce~~ has produced a high deviation map similar to the one which they passed the light last cycle we should also examine the possibility of a *Larios* action there as well.

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~~What about New York we need to call Deborah and get the latest on the situation there.~~